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SUPREME COURT OF THE UNITED STATES

59590
Sup. Ct.

OCTOBER TERM, 1943

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# No. 603

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GEORGE H. BEILFUSS,

*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA.

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APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA.

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## STATEMENT AS TO JURISDICTION.

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MORRIS LAVINE,
*Counsel for Appellant.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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# No. 603

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GEORGE H. BEILFUSS,

*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Appellee.*

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## STATEMENT OF JURISDICTION ON APPEAL.

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In compliance with Rule 12, appellant herewith presents his statement of jurisdiction on appeal.

A.

The statutory provisions which sustain jurisdiction are Section 237 Judicial Code, 28 U. S. C. A. 344 as amended by Act of January 31, 1928, Chap. 14, 45 Stats. 54, an Act of April 26, 1928, Chap. 440, 45 Stats. 466.

B.

The questions involved in this case are whether unlawful search and seizure of property in a state court and the use of such evidence in the trial of the case violates the Four-

teenth Amendment to the Constitution of the United States which provides that "* * * nor shall any state deprive any person of life, liberty or property without due process of law."

C.

The opinion of the District Court of Appeal of the State of California was rendered on rehearing June 7, 1943; a petition for hearing in the Supreme Court of California was denied on July 1, 1943, and the remittitur issued on July 8, 1943. Petition for appeal, assignment of errors and prayer for reversal were filed in the District Court of Appeal on September 27, 1943.

D.

**Nature of Case and Rulings Below.**

The appellant stands convicted of counts 3, 4, 5, 8 and 9 of an information charging him with grand theft. He was arrested on August 20, 1941, at his office at 503 Commercial Exchange Building, 8th and Olive streets, Los Angeles, California, and was removed to an outlying jail at Glendale, California, and secreted by officers of the law while they ransacked his office and took from it all of his papers, books and documents.

Thereafter and while the appellant was in the Glendale jail, held in custody without arraignment and without counsel, other officers of the law, in conspiracy with the officers who took him to the Glendale jail, seized his books, papers and effects and took them to the office of the District Attorney. The officers had no search warrant or other legal process.

Said books, papers and effects were thereafter used in the trial against him and to bring about his conviction.

Prior to the trial in the Superior Court and after appellant's arrest, he commenced a claim and delivery action in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, the court having jurisdiction thereof, to secure the return of his books, papers and effects and to have them available for his trial.

When the case was called for trial, at the very outset of the trial, appellant moved the trial court for a continuance of the case and for a return of his books, papers and effects unlawfully seized, as being in violation of the defendant's rights under the Constitution of the United States. This motion was denied by the Superior Court and the case proceeded to trial forthwith, and during the course of the trial the books, papers and effects so unlawfully seized were used in evidence against the defendant over his claim and objection that they were unlawfully searched and seized in violation of his rights under the Constitution of the United States.

Thereafter, on appeal to the District Court of Appeal of the State of California, Second Appellate District, Division Three, the same question was raised, and the District Court of Appeal in its opinion, decision and determination ruled against the claim of violation of his rights under the United States Constitution and affirmed the judgments.

The petition of the defendant to the Supreme Court of California in which the same constitutional rights were challenged, was also denied.

The question raised by this case is whether the principles enunciated by the Supreme Court of the United States under the Fourth and Fifth Amendments to the Constitution of the United States are equally applicable to the courts of the states under the Fourteenth Amendment, and whether the removal of a defendant from his office and the unlawful search and seizure of his books, papers and effects

after his removal, constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The issue involved in this case also is whether the seizure of the defendant and his removal from his office and the removal of his books, papers and effects thereupon without any search warrant, to be used in evidence against him, and which evidence is later used against him, so fatally infects the fairness of the trial as to constitute a violation of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

MORRIS LAVINE,
*Attorney for Appellant.*

**Cases Believed to Sustain Jurisdiction.**

*Lisenba* v. *California*, 86 L. Ed. 179;
*Whitney* v. *California*, 274 U. S. 357;
*Fiske* v. *Kansas*, 274 U. S. 380;
*Stromberg* v. *California*, 283 U. S. 359;
*Galpin* v. *Page*, 18 Wall. (U. S.) 350;
*Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158;
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*Chambers* v. *Florida*, 309 U. S. 227, 84 L. Ed. 682;
*Brown* v. *Mississippi*, 80 L. Ed. 682;
*Goldman* v. *United States*, 86 L. Ed. 1322;
*Olmstead* v. *United States*, 277 U. S. 438, 72 L. Ed. 944;
*Agnello* v. *United States*, 70 L. Ed. 145;
*Carroll* v. *United States*, 69 L. Ed. 543;
*United States* v. *Lee*, 71 L. Ed. 1202;
*Boyd* v. *United States*, 29 L. Ed. 752;
*Weeks* v. *United States*, 58 L. Ed. 52;
*Silverthorn Lmbr. Co.* v. *United States*, 64 L. Ed. 319;
*Gouled* v. *United States*, 65 L. Ed. 647;
*Amos* v. *United States*, 65 L. Ed. 654;
*Byers* v. *United States*, 71 L. Ed. 520.

## APPENDIX "A".

[Crim. No. 3596. Second Dist., Div. Three. Nov. 17, 1942.]

THE PEOPLE, Respondent,

v.

GEORGE H. BEILFUSS, Appellant

Appeal from judgments of the Superior Court of Los Angeles County and from an order denying a new trial. Thomas L. Ambrose, Judge. Affirmed in part and reversed in part.

Prosecution for grand theft. Judgments of conviction on certain counts affirmed as to some and reversed as to others.

[Rehearing granted Dec. 2, 1942.]

John S. Cooper for Appellant.

Earl Warren, Attorney General, Frank Richards, Deputy Attorney General, John F. Dockweiler, District Attorney, and Marcus R. Brandler, Deputy District Attorney, for Respondent.

SHAW, J. pro tem.—The defendant was charged in each of twelve counts of an information with grand theft. He was tried without a jury and convicted on all counts. Later his motion for a new trial was granted as to counts II, VI and XI, and those counts were dismissed. He appeals from the judgments entered on the remaining counts and from an order denying his motion for a new trial.

Each count charges a theft of money from the same persons, Miss Caroline A. Ingersoll and Miss Frances L. Proctor, the amounts and dates being different. The two ladies mentioned were past eighty years of age and had lived together for forty years or more, at the time of their dealings with defendant from which these charges arose. They appear to have had no independent advice regarding these dealings. Miss Proctor died before the trial and the testimony in support of the charges was given by Miss Ingersoll only, insofar as it relates to the taking of the money

and the statements and representations made by the defendant in connection therewith. Defendant's principal point on this appeal is that the evidence is insufficient to support the convictions because, as to each count, if the testimony of Miss Ingersoll shows any offense, such offense is the species of theft known as the obtaining of money by false pretenses, and in no case was the pretense in writing or accompanied by any false token or writing, or her testimony regarding it corroborated as required by section 1110 of the Penal Code. He also contends that there was a variance between the pleading and the proof as to the identity of the persons defrauded, that evidence obtained by a wrongful search of his office and seizure of articles found therein was improperly admitted in evidence and that his motion for a return of this evidence and his motion for a continuance were wrongly denied. We will discuss the contentions last mentioned first.

[1] The defendant's point relating to the variance is that in all cases the theft is alleged to have been from two persons, Miss Ingersoll and Miss Proctor, while in some of the cases the testimony shows that the money was delivered to defendant by one or the other of them only. To this argument a sufficient answer is found in this provision of section 956 of the Penal Code: "When an offense involves the commission of * * * a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured * * * is not material." (*People* v. *Foster*, (1926) 198 Cal. 112, 122 [243 P. 667]; *People* v. *Cloud*, (1929) 100 Cal. App. 792, 794 [281 P. 79].) Moreover, there is proof of the allegations as made, for it appears from the testimony of Miss Ingersoll that she and Miss Proctor had an arrangement by which all these transactions were for their joint account, no matter which one paid out the money in the first place, and they settled the disbursements between themselves from time to time.

[2] It appears from a showing made by defendant in the trial court that at the time of his original arrest on the charges involved in this case he was taken from his office, where the arrest was made, and that an investigator from

the district attorney's office, who accompanied the arresting officer, but had no search warrant, remained behind after defendant's removal, searched through defendant's papers and removed a part of them. Defendant then began in the Los Angeles Municipal Court an action against the district attorney to recover possession of these papers, obtained a speedy trial of that action, and at the commencement of the trial of the case at bar had just received word that the municipal court case had been decided against him, but no judgment had then been entered. He then made a motion for a continuance of the trial of this criminal case to enable him to appeal from the judgment in the municipal court case and have the appeal heard, in the hope of obtaining a reversal of the then as yet unentered judgment. Defendant also presented a petition to the trial court in this case for the return to him of the papers so taken from him, which was denied, the court rejecting his offer to prove the facts above stated. When such papers were offered in evidence he objected to them on the ground that they had been obtained by an unlawful search and seizure, but his objection was overruled and they were received in evidence. His argument here on these matters amounts to a request that we overrule or ignore the decision in *People* v. *Mayen*, (1922) 188 Cal. 237 [205 P. 435, 24 A. L. R. 1383], where it was held that upon an offer of evidence the court will not inquire into the manner in which that evidence was obtained or exclude it because it was obtained by means of an unlawful search and seizure, and that, while the defendant in such a case has a right to recover possession of papers wrongfully taken, his proceedings to do so are no proper part of the trial of the criminal case against him and the decision thereon cannot be reviewed on appeal from the judgment in the criminal case. This decision was considered and reaffirmed in *People* v. *Gonzales*,[1] (1942) 20 Cal. 2d 165, 168 [124 P. 2d 44], and is immune from attack in this court. Neither of these cases dealt with a motion for a continuance, such as we have here, but we think that, on the showing here made, the court did not abuse its discretion in denying the motion.

[1] Advance Report Citation: 20 A.C. 158, 161.

[3] As already stated, defendant contends that, if any offenses are shown by the evidence, they are what would formerly have been designated as the obtaining of money by false pretenses. Since the 1927 amendment of section 484 of the Penal Code, this sort of crime is now included in the definition of theft. But it still remains subject to the provisions of section 1110 of the Penal Code that "the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof, is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances. * * *" (*People* v. *Fawver*, (1938) 29 Cal. App. 2d (Supp.) 775, 777 [77 P. 2d 325], and cases there cited.) Except as to count XII, which we will discuss later, the People do not claim that, viewing the case as one of false pretenses, there is evidence sufficient to comply with the requirements of section 1110. No such evidence is called to our attention and we have found none on an examination of the record.

[4] The People contend, however, that the evidence does show, as to each count, a case of larceny by trick and device. While such an offense is within the statutory definition of theft, above mentioned, it is not subject to the provisions of section 1110. (*People* v. *Fawver, supra*, (1938) 29 Cal. App. 2d (Supp.) 775, 777.) [5] The distinctions between the offenses of obtaining money by false pretenses and larceny by trick and device were discussed and the authorities on the subject reviewed in some detail in *People* v. *Fawver, supra*. We adopt what was there said as expressing our views. After quoting from *People* v. *De Graaff*, (1900) 127 Cal. 676, 679 [60 P. 429], the statement that "Whether the offense was larceny, or the obtaining money under false pretenses, depended upon the question of fact whether Mrs. Healey [the victim] intended to part with the title to the money," and citing many other cases to the same point, the court in *People* v. *Fawver* said, at 29 Cal. App. 2d (Supp.) 779, 780: "As is stated in some of the cases above cited, the rule of law regarding the dis-

tinction between the two offenses under discussion is clear, but its application to the facts is often difficult. All of these cases adhere to the rule stated. The passing of title referred to in the rule is the complete title to the property; although the defendant obtains at the time possession is delivered to him some special interest or right in money or other property delivered, yet if the victim retains an interest therein, there may be a larceny. Also, if the victim intends title to pass at some time later than the delivery, or upon the fulfillment of some condition not then performed, there may be a larceny. A still more common case is that the victim delivers money or property to the defendant as a loan to enable him to carry out some special plan, or upon some trust, or for some special purpose, as, to invest it, or to buy property with it. In all these cases the title does not pass to defendant on delivery to him, and if he then takes what is delivered to him with the intention of appropriating it to his own use, there is a larceny. But this case presents no such facts. Here the money was delivered to defendant, according to the record, 'in advance, as payment on these fittings.' Tinkle had refused to make a loan to defendant or to finance him in the making of molds for these fittings, but on being told that defendant had made the fittings he bought some and *paid* a part of the price in advance. There was no loan, no plan or purpose in the mind of Tinkle to which he expected the money to be applied. A payment passes to the payee a present and complete title to the property given in payment. (See 48 C. J. 631.) If the consideration for which a payment is made is not forthcoming, the payor may rescind and recover what he paid, but that possibility does not alter the original effect of the payment as a transfer of title." To same effect see *People* v. *Barnett*, (1939) 31 Cal. App. 2d 173, 175 [88 P. 2d 172].

Bearing the foregoing distinctions in mind, we address ourselves to a consideration of the evidence relating to the individual counts.

Count I.

[6a] This count charges a theft of $300 on May 28, 1940. The facts appearing in regard to this are, briefly, that the

defendant informed Miss Proctor and Miss Ingersoll—whom we shall hereinafter refer to as "the victims" when it is necessary to mention them conjointly—that an option which they had given to one Van Stone on some New Mexico land had been bought by another man, and that this transferee claimed he had been defrauded and wanted $300 to reimburse him for what he had paid for the option or otherwise he might sue the victims. Defendant further said he had paid $300 to this transferee to get the option and had then destroyed it and he demanded of the victims repayment of this $300. They paid him $300 in response to this demand, and this payment is the subject of count I. We find no direct evidence of the falsity of the statements thus made by defendant to the victims as a reason for the payment of the $300 to him by them, although the very nature of those statements is such as to cause anyone less trustful and confiding than the victims appear to have been to question them. But however much we may doubt the reality of the transaction thus narrated to the victims, and even assuming its nonexistence, we are unable to see in the evidence anything but the obtaining of money by false pretenses. The victims paid the money to defendant to reimburse him for an expenditure he claimed already to have made in their behalf; there was no condition attached to the payment, nothing more for defendant to do in the matter, no plan or purpose in the minds of the victims to which the money was to be applied. As far as their intentions were concerned, the transaction was closed by the payment. The payment, though made for a nonexisting consideration, was as effective to pass a present and complete title to the money as was the payment for nonexisting pipe fittings in *People* v. *Fawver, supra,* (1938) 29 Cal. App. 2d (Supp.) 775. (See, also, *People* v. *Shearer,* (1927) 83 Cal. App. 321, 331, 332 [256 P. 611].)

Count III.

Counts III, IV, V, VII, VIII, IX and X revolve about defendant's dealings with the victims in regard to some land in Fresno County. [7] About the latter part of September or the first part of October, 1940, defendant said to them that he had discovered some valuable oil land in Fresno County

which belonged to them but was incumbered by taxes and assessments amounting to $6,000 or $7,000, and that it was so valuable they ought to try to get it back; and he offered to attend to it for them. He at first said there were 3¼ acres of this land, but later said there were 4¼ acres. They had not heard of this land before, and said they could not put up all the money necessary but would allow him "to go after it if he was willing to put up the extra money that was necessary." About the middle of November, 1940, defendant inquired of Murray Blank, who had a real estate subdivision in Fresno County, if any of that acreage was available, and on November 16, 1940, defendant paid Blank $320 and for that sum received a deed conveying to him 4¼ acres of land in Fresno County. Blank had owned this land for about a year before defendant bought it, and testified that he had paid the taxes on it, that they amounted to thirty to thirty-five cents per acre, and that there were no back taxes on it when he sold it to defendant. Defendant then executed two deeds, dated November 27, 1940, by which he conveyed to each of the victims approximately half in area of the land he had thus acquired from Blank, had these deeds recorded and then gave them to the victims, saying that he thought it would be better to get the Fresno County land in his own name and then transfer it to them.

About October 8, 1940, Miss Ingersoll gave defendant $1,000 in the form of a cashier's check which she obtained from a bank by putting up three bonds as security. This is the subject matter of count III. The conversation at the time she gave him this check was "that he was to use it in paying those taxes. Q. Who said that? A. Well, that is what he claimed I should pay him, he wanted to use that much money at the time. Q. On this Fresno County land? A. Yes, sir, it was to go toward the taxes, toward the redemption of the land * * * it was an advance payment on what he would have to pay toward redeeming the Fresno land." This check was cashed by defendant. This evidence is sufficient to show a larceny by trick and device, under the rules above stated. Miss Ingersoll did not intend to pass to defendant an absolute, or indeed any, title to the money so given to him; there was a special plan or purpose in her

mind to which she expected the money to be applied, that is, the redemption of this Fresno County land, which she supposed the victims owned, from taxes. This plan or purpose failed in two ways; first, there was then no land owned by them, and second, the land which defendant later proffered as theirs was subject to no back taxes. Plainly the defendant had, at the time the money was delivered to him, the intention of appropriating it to his own use, and the case is one of larceny rather than false pretenses.

Count IV.

In November 14, 1940, Miss Ingersoll, according to her testimony, turned over to defendant two bonds for which he told her he got $1,385. Other evidence shows that the next day after these bonds were delivered to defendant they were pledged to a bank to secure his note, and that they were later sold for $1,395.62, defendant's note was paid with part of the proceeds and the balance was turned over to him. Just before testifying to the delivery of these bonds, Miss Ingersoll testified: "Q. By Mr. Hinshaw: Now, after you had given Mr. Beilfuss this $1000.00, [the subject of Count III] did you have any further conversation with him about this Fresno land at any other date? A. Yes, sir, he would come every little while and want some more money. Q. And did he tell you what he wanted the money for? A. Well, it was to pay these men that had paid the taxes, the redemption. Q. Did he ever tell you how much the total amount was? A. He did at the last, yes. It was, in addition to what we had paid him, he claimed that he had furnished six thousand and some odd dollars. I can't remember how much." Just after testifying to the delivery of the bonds, she further testified: "Q. What were the circumstances of your turning those bonds over to Mr. Beilfuss? A. Well, he claimed that we owed him some money, he had to use this money to pay on the taxes. * * * I asked him for the confirmation slips. He didn't tell me where he sold them, but he kept saying he would bring those confirmation slips, but he didn't do it." This testimony is somewhat ambiguous, but it is capable of the construction, which the trial court evidently put upon it, that these bonds were delivered to

defendant in trust to use the proceeds in paying the taxes on the Fresno land. We must apply the same rules here as in case of count III already discussed and reach the same conclusion.

Count V.

On November 23, 1940, Miss Ingersoll delivered some stock to defendant, which he sold for $723.94, keeping the money. The general statement already quoted under count IV that "he would come every little while and want some more money * * * to pay these men that had paid the taxes, the redemption" is applicable to this transaction, and leads to the same conclusion announced on count IV.

Count VII.

[6b] On January 2, 1941, Miss Proctor gave defendant a check for $350. The testimony regarding this is "he claimed that she owned it, or something. * * * Q. * * * what was said about that? A. Well, that is 350 that was still due him on the land. * * * It was the Fresno land * * * that we had cleared up all the other expenses except that $350.00, and that was for his expenses in some phase of it—— he had it itemized." We can make of this nothing more than an absolute payment to defendant, intended by the victims to reimburse him for money they supposed he had previously paid out in their behalf. This count is the same as count I in principle and the same conclusion must be reached regarding it.

Count VIII.

[8] After the victims received the deeds to the Fresno County land, they executed an option on it to a man named Evans, who took the option away with him. Miss Ingersoll had previously talked with defendant by telephone regarding the matter and he had said that Evans would bring out an option prepared by defendant. A little later defendant came to see them and said Evans had substituted another option for the one drawn by defendant and changed the number of acres called for by it to 14½ instead of 4½ that they owned and had then sold it to two men for $18,500,

and that these men demanded that the victims either convey 14½ acres or return to the men the $18,500 paid by them for the option, and threatened to sue the victims if this was not done. The victims naturally did not know what to do in this situation. They told defendant they could not pay $18,500, and he then came forward with a solution; he said, according to Miss Ingersoll, that "if we could furnish $3,500 that he could raise $15,000 and he felt somewhat responsible * * * and that he wanted to try to help us all that he could * * * there was nothing to do but try to pay that $18,500." They gave him six bonds as collateral to furnish the $3,500, Miss Proctor furnishing four and Miss Ingersoll two. Miss Ingersoll testified regarding this matter, "we simply delivered our bonds as collateral for something that he would borrow at the bank, but he said he would try to keep those bonds simply as collateral so that they could be returned to us later, instead of sold." Defendant borrowed money on the bonds and then sold them and realized from them, net after furnishing Miss Ingersoll $1,000 to pay off a lien on her bonds, a sum in excess of $2,900 (stated in this count to be $2,921.51). No question is raised about the sufficiency of the evidence to show the fictitious nature of the claim which, according to the defendant, was being asserted against the victims and was to be settled by means of the dealings involved in this count, but we have examined it and find it sufficient on this point. Here again there is evidence that the victims did not intend to pass the complete title to these bonds or their proceeds to the defendant, but intended them to be applied to a special purpose, and that defendant intended, when he received them, to appropriate them to his own use. A larceny by trick and device sufficiently appears.

Count IX.

[6c] At the time the victims made the payment discussed under count VIII they gave defendant a promissory note for $15,000 for the money he was supposed to be advancing. On February 14, 1941, Miss Ingersoll paid the defendant $500, "on what he said we owed him." This is another case of an ordinary payment and the offense proved is the obtaining of money by false pretenses.

## Count X.

On April 3, 1941, Miss Ingersoll gave defendant $890.55 by endorsing to him a check for that amount payable to her. She had no recollection of her conversation with him at the time. The endorsement was in the ordinary form which transfers title, and we cannot regard the evidence on this count as sufficient to show anything other than such a transfer. No conditions or qualifications to the transfer appear and a case of larceny is not made out.

## Count XII.

[9] About July 10, 1941, defendant stated to the victims that he had run across some property that belonged to Evans—the same man who had obtained from them the option above mentioned in the discussion of count VIII—that he could get a lien on and that he had to supply some money to somebody who had investigated the matter and that if he could get hold of that land he could sell it for a large amount of money, and that this land was very valuable. On the same day Miss Proctor sold some shares of *common stock* of Pacific Southern Investors for $438.78 and caused the proceeds to be paid to defendant. She had previously handed the stock to defendant for delivery to the brokers who made the sale. While the date of this transaction differs from that alleged in count XII by four days, the amount is the same. The People assert and the defendant concedes that count XII is aimed at this transaction; hence we so regard it. Miss Ingersoll testified that it was "upon the strength of" the above mentioned statement of defendant and *her* belief in it "that the *bonds* were turned over, of the Pacific Southern Investors." In connection with this transaction defendant signed and left with the victims a receipt for *stock* of "Pacific *Southwest* Investors." The defendant admits receiving and selling the stock described in the receipt, but says the proceeds were applied to the price of land sold by him to the victims. This evidence fails to show that the property which Miss Proctor was induced by defendant's statements to turn over to him was the same as that the proceeds of which defendant ultimately received. Miss Ingersoll testified only to

*bonds* turned over by reason of such representations. The property sold, according to the broker who sold it, was *stock* of the same corporation, and the receipt given by defendant was for stock of a differently named corporation. Hence we are left in the dark as to the nature of the transaction by which defendant got whatever came to him and cannot say that a crime was committed by defendant. For this reason we do not consider the People's contention that defendant's receipt was a false token within the meaning of section 1110 of the Penal Code. If all the differing descriptions refer to the same property, that can be shown on another trial. It cannot be assumed, without evidence, that such was the fact.

The defendant testified that all his dealings with the victims were mere sales of land or interests therein to them and the payments they made to him were on account of the prices due him on such sales, and denied Miss Ingersoll's testimony of his statements so far as it showed a different state of facts. But this merely raised a conflict in the evidence and, on familiar rules, the trial court's decision in that matter is binding upon us.

The judgments on counts III, IV, V and VIII and the order denying a new trial on those counts are affirmed. The judgments on counts I, VII, IX, X and XII, and the order denying a new trial on those counts are reversed and the cause is remanded for a new trial on those counts.

Shinn, Acting P. J., and Wood (Parker), J., concurred.

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## APPENDIX "B".

[Crim. No. 3596. Second Dist., Div. Three. June 7, 1943.]

THE PEOPLE, Respondent,

v.

GEORGE H. BEILFUSS, Appellant

[On rehearing after judgment affirmed in part and reversed in part (55 A. C. A. 641, 131 P. 2d 867). Judgment of superior court affirmed in part and reversed in part.]

Appeal from judgments of the Superior Court of Los Angeles County and from an order denying a new trial.

Thomas L. Ambrose, Judge. Affirmed in part and reversed in part.

Prosecution for grand theft. Judgments of conviction on certain counts affirmed as to some and reversed as to others.

John S. Cooper for Appellant.

Earl Warren, Attorney General, Frank Richards, Deputy Attorney General, John F. Dockweiler, District Attorney, Jere T. Sullivan and Marcus R. Brandler, Deputies District Attorney, for Respondent.

SHAW, J. pro tem.:

The defendant was charged in each of twelve counts of an information with grand theft. He was tried without a jury and convicted on all counts. Later his motion for a new trial was granted as to counts II, VI and XI, and those counts were dismissed. He appeals from the judgments entered on the remaining counts and from an order denying his motion for a new trial.

Each count charges a theft of money from the same persons, Miss Caroline A. Ingersoll and Miss Frances L. Proctor, the amounts and dates being different. The two ladies mentioned were past eighty years of age and had lived together for forty years or more, at the time of their dealings with defendant from which these charges arose. Miss Proctor died before the trial and the testimony in support of the charges was given by Miss Ingersoll only, insofar as it relates to the taking of the money and the statements and representations made by the defendant in connection therewith. Defendant's principal point on this appeal is that the evidence is insufficient to support the convictions. He also contends that there was a variance between the pleading and the proof as to the identity of the persons defrauded, that evidence obtained by a wrongful search of his office and seizure of articles found therein was improperly admitted in evidence and that his motion for a return of this evidence and his motion for a continuance were wrongly denied. We will discuss the contentions last mentioned first.

[1] The defendant's point relating to the variance is that in all cases the theft is alleged to have been from two per-

sons, Miss Ingersoll and Miss Proctor, while in some of the cases the testimony shows that the money was delivered to defendant by one or the other of them only. To this argument a sufficient answer is found in this provision of section 956 of the Penal Code: "When an offense involves the commission of * * * a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured * * * is not material." (*People* v. *Foster*, (1926) 198 Cal. 112, 122 [243 P. 667]; *People* v. *Cloud*, (1929) 100 Cal. App. 792, 794 [281 P. 79].) Moreover, there is proof of the allegations as made, for it appears from the testimony of Miss Ingersoll that she and Miss Proctor had an arrangement by which all these transactions were for their joint account, no matter which one paid out the money in the first place, and they settled the disbursements between themselves from time to time.

[2] It appears from a showing made by defendant in the trial court that at the time of his original arrest on the charges involved in this case he was taken from his office, where the arrest was made, and that an investigator from the district attorney's office, who accompanied the arresting officer, but had no search warrant, remained behind after defendant's removal, searched through defendant's papers and removed a part of them. Defendant then began in the Los Angeles Municipal Court an action against the district attorney to recover possession of these papers, obtained a speedy trial of that action, and at the commencement of the trial of the case at bar had just received word that the municipal court case had been decided against him, but no judgment had then been entered. He then made a motion for a continuance of the trial of this criminal case to enable him to appeal from the judgment in the municipal court case and have the appeal heard, in the hope of obtaining a reversal of the then as yet unentered judgment. Defendant also presented a petition to the trial court in this case for the return to him of the papers so taken from him, which was denied, the court rejecting his offer to prove the facts above stated. When such papers were offered in evidence he objected to them on the ground that they had been

obtained by an unlawful search and seizure, but his objection was overruled and they were received in evidence. His argument here on these matters amounts to a request that we overrule or ignore the decision in *People* v. *Mayen*, (1922) 188 Cal. 237 [205 P. 435, 24 A.L.R. 1383], where it was held that upon an offer of evidence the court will not inquire into the manner in which that evidence was obtained or exclude it because it was obtained by means of an unlawful search and seizure, and that, while the defendant in such a case has a right to recover possession of papers wrongfully taken, his proceedings to do so are no proper part of the trial of the criminal case against him and the decision thereon cannot be reviewed on appeal from the judgment in the criminal case. This decision was considered and reaffirmed in *People* v. *Gonzales*, (1942) 20 Cal. 2d 165, 168 [124 P. 2d 44], and is immune from attack in this court. Neither of these cases dealt with a motion for a continuance, such as we have here, but we think that, on the showing here made, the court did not abuse its discretion in denying the motion.

[3] Defendant's contention on the evidence is that, if any offenses are shown, they are what would formerly have been designated as the obtaining of money by false pretenses, and that the testimony of Miss Ingersoll is not corroborated. Since the 1927 amendment of section 484 of the Penal Code, this sort of crime is now included in the definition of theft. But it still remains subject to the provisions of section 1110 of the Penal Code that "the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances. * * *" (*People* v. *Fawver*, (1938) 29 Cal. App. 2d (Supp.) 775, 777 [77 P. 2d 325], and cases there cited.) As to some of the counts the People contend that the evidence satisfies the requirements of this section. [4] As to all but count X, they further contend that the evidence shows a case of larceny by trick and device. While such an

offense is within the statuory definition of theft, above mentioned, it is not subject to the provisions of section 1110. (*People v. Fawver, supra.*)

[5] The distinctions between the offenses of obtaining money by false pretenses and larceny by trick and device were discussed in *People* v. *Delbos,* (1905) 146 Cal. 734, 736 [81 P. 131], where the court quoted the following statement from a text book, italicising it as we do: "In larceny, the owner of the thing has no intention to part with his property therein *to the person taking it,* although he may intend to part with the possession. In false pretenses the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud." The court, after quoting other authorities of which it said, "the meaning is the same," proceeded: "These authors are here speaking of the intention of the owner with respect to the relation which the person then receiving the goods shall bear to them; that is, the owner's intention as to the effect which the delivery of the possession to the defendant shall have on the title. If such delivery is intended to transfer the title, absolutely, there is no larceny, for the goods are then no longer his property, and a subsequent theft of them would be a theft of the goods of the person to whom title was thus transferred, and furthermore the defendant would then be invested with the title himself, and could not be guilty of stealing that which is his own." In *People* v. *Fawver, supra,* 29 Cal. App. 2d (Supp.) 775, 779-780 [77 P. 2d 325], this subject was further discussed and the authorities on the subject were reviewed in some detail. We adopt what was there said as expressing our views. After citing *People* v. *Delbos, supra,* and many other cases to the same point, the court in *People* v. *Fawver* said: "The passing of title referred to in the rule is the complete title to the property; although the defendant obtains at the time possession is delivered to him some special interest or right in money or other property delivered, yet if the victim retains an interest therein, there may be a larceny. Also, if the victim intends title to pass at some time later than the delivery, or upon the fulfillment of some condition not then performed, there may be a larceny. A still more common case is that

the victim delivers money or property to the defendant as a loan to enable him to carry out some special plan, or upon some trust, or for some special purpose, as, to invest it, or to buy property with it. In all these cases the title does not pass to defendant on delivery to him, and if he then takes what is delivered to him with the intention of appropriating it to his own use there is a larceny. But this case presents no such facts. Here the money was delivered to defendant, according to the record, 'in advance, as payment on these fittings.' Tinkle had refused to make a loan to defendant or to finance him in the making of molds for these fittings, but on being told that defendant had made the fittings he bought some and *paid* a part of the price in advance. There was no loan, no plan or purpose in the mind of Tinkle to which he expected the money to be applied. A payment passes to the payee a present and complete title to the property given in payment. (See 48 C. J. 631.) If the consideration for which a payment is made is not forthcoming, the payor may rescind and recover what he paid, but that possibility does not alter the original effect of the payment as a transfer of title." To same effect see *People* v. *Barnett*, (1939) 31 Cal. App. 2d 173, 175 [88 P. 2d 172].

Bearing the foregoing distinctions in mind, we address ourselves to a consideration of the evidence relating to the individual counts.

COUNT I.

[6a] This count charges a theft of $300 on May 28, 1940. The facts appearing in regard to this are, briefly, that the defendant informed Miss Proctor and Miss Ingersoll—whom we shall hereinafter refer to as "the victims" when it is necessary to mention them conjointly—that an option which they had given to one Van Stone on some New Mexico land had been bought by another man, and that this transferee claimed he had been defrauded and wanted $300 to reimburse him for what he had paid for the option or otherwise he might sue the victims. Defendant further said he had paid $300 to this transferee to get the option and had then destroyed it and he demanded of the victims repayment of this $300. They paid him $300 in response to this demand, and this payment is the subject of count I. We find

no direct evidence of the falsity of the statements thus made by defendant to the victims as a reason for the payment of the $300 to him by them, although the very nature of those statements is such as to cause anyone less trustful and confiding than the victims appear to have been to question them. But however much we may doubt the reality of the transaction thus narrated to the victims, and even assuming its nonexistence, we are unable to see in the evidence anything but the obtaining of money by false pretenses. The victims paid the money to defendant to reimburse him for an expenditure he claimed already to have made in their behalf; there was no condition attached to the payment, nothing more for defendant to do in the matter, no plan or purpose in the minds of the victims to which the money was to be applied. As far as their intentions were concerned, the transaction was closed by the payment. The payment, though made for a nonexisting consideration, was as effective to pass a present and complete title to the money as was the payment for nonexisting pipe fittings in *People* v. *Fawver, supra,* (1938) 29 Cal. App. 2d (Supp.) 775 [77 P. 2d 325]. (See, also, *People* v. *Shearer,* (1927) 83 Cal. App. 321, 331, 332 [256 P. 611].)

[7] The money involved in this count was paid to defendant by a check, which was introduced in evidence. The People argue that this is sufficient to satisfy section 1110, Penal Code, as a false token or writing. The cases contain no clear definitions of these terms, but to bring an object within either, there must, of necessity, be something false about it. A writing which is genuine and contains no false statements of fact cannot be a "false token or writing." The check is, therefore, excluded from this category. (*People* v. *Carter,* (1933) 131 Cal. App. 177, 184 [21 P. 2d 129]; see, also, *People* v. *Wynn,* (1941) 44 Cal. App. 2d 723, 728 [112 P. 2d 979]; *People* v. *Payton,* (1939) 36 Cal. App. 2d 41, 53 [96 P. 2d 991]; *People* v. *Pearson,* (1924) 69 Cal. App. 524, 531 [231 P. 612].) *People* v. *Harrman,* (1940) 40 Cal. App. 2d 487, 492 [104 P. 2d 1063], cited by respondent, does not hold to the contrary, for it specifically declares that the writing there considered was not used "for the purpose suggested in section 1110."

[8] It is also argued that there is sufficient corroboration of Miss Ingersoll. But the corroboration required by section 1110 is of the making of the pretense. (*People* v. *Walker*, (1924) 69 Cal. App. 475, 496 [231 P. 572].) We find no corroboration going to this subject.

Count III.

Counts III, IV, V, VII, VIII, IX and X revolve about defendant's dealings with the victims in regard to some land in Fresno County. [9] About the latter part of September or the first part of October, 1940, defendant said to them that he had discovered some valuable oil land in Fresno County which belonged to them but was incumbered by taxes and assessments amounting to $6,000 or $7,000, and that it was so valuable they ought to try to get it back; and he offered to attend to it for them. He at first said there were 3¼ acres of this land, but later said there were 4¼ acres. They had not heard of this land before, and said they could not put up all the money necessary but would allow him "to go after it if he was willing to put up the extra money that was necessary." About the middle of November, 1940, defendant inquired of Murray Blank, who had a real estate subdivision in Fresno County, if any of that acreage was available, and on November 16, 1940, defendant paid Blank $320 and for that sum received a deed conveying to him 4¼ acres of land in Fresno County. Blank had owned this land for about a year before defendant bought it, and testified that he had paid the taxes on it, that they amounted to thirty to thirty-five cents per acre, and that there were no back taxes on it when he sold it to defendant. Defendant then executed two deeds, dated November 27, 1940, by which he conveyed to each of the victims approximately half in area of the land he had thus acquired from Blank, had these deeds recorded and then gave them to the victims, saying that he thought it would be better to get the Fresno County land in his own name and then transfer it to them.

About October 8, 1940, Miss Ingersoll gave defendant $1,000 in the form of a cashier's check which she obtained from a bank by putting up three bonds as security. This is the subject matter of count III. The conversation at the

time she gave him this check was "that he was to use it in paying those taxes. Q. Who said that? A. Well, that is what he claimed I should pay him, he wanted to use that much money at the time. Q. On this Fresno County land? A. Yes sir, it was to go toward the taxes, toward the redemption of the land * * * it was an advance payment on what he would have to pay toward redeeming the Fresno land." This check was cashed by defendant. This evidence is sufficient to show a larceny by trick and device, under the rules above stated. Miss Ingersoll did not intend to pass to defendant an absolute, or indeed any, title to the money so given to him; there was a special plan or purpose in her mind to which she expected the money to be applied, that is, the redemption of this Fresno County land, which she supposed the victims owned, from taxes. She was tricked into making this payment in two ways; first, there was then no land owned by them, and second, the land which defendant later proffered as theirs was subject to no back taxes. Plainly the defendant had, at the time the money was delivered to him, the intention of appropriating it to his own use, and the case is one of larceny rather than false pretenses.

Count IV.

On November 14, 1940, Miss Ingersoll, according to her testimony, turned over to defendant two bonds for which he told her he got $1,385. Other evidence shows that the next day after these bonds were delivered to defendant they were pledged to a bank to secure his note, and that they were later sold for $1,395.62, defendant's note was paid with part of the proceeds and the balance was turned over to him. Just before testifying to the delivery of these bonds, Miss Ingersoll testified: "Q. By Mr. Hinshaw: Now, after you had given Mr. Beilfuss this $1000.00, [the subject of Count III] did you have any further conversation with him about this Fresno land at any other date? A. Yes, sir, he would come every little while and want some more money. Q. And did he tell you what he wanted the money for? A. Well, it was to pay these men that had paid the taxes, the redemption. Q. Did he ever tell you how much the total amount was? A. He did at the last, yes. It was, in addition to what we

had paid him, he claimed that he had furnished six thousand and some odd dollars. I can't remember how much." Just after testifying to the delivery of the bonds, she further testified: "Q. What were the circumstances of your turning those bonds over to Mr. Beilfuss? A. Well, he claimed that we owed him some money, he had to use this money to pay on the taxes. • • • I asked him for the confirmation slips. He didn't tell me where he sold them, but he kept saying he would bring those confirmation slips, but he didn't do it." This testimony is somewhat ambiguous, but it is capable of the construction, which the trial court evidently put upon it, that these bonds were delivered to defendant in trust to use the proceeds in paying the taxes on the Fresno land. We must apply the same rules here as in case of count III already discussed and reach the same conclusion.

Count V.

On November 23, 1940, Miss Ingersoll delivered some stock to defendant, which he sold for $723.94, keeping the money. The general statement already quoted under count IV that "he would come every little while and want some more money • • • to pay these men that had paid the taxes, the redemption" is applicable to this transaction, and leads to the same conclusion announced on count IV.

Count VII.

[6b] On January 2, 1941, Miss Proctor gave defendant a check for $350. The testimony regarding this is: "he claimed that she owed it, or something. I don't remember about that. • • • Q. • • • what was said about that? A. Well, that is 350 that was still due him on the land. • • • It was the Fresno land • • • that we had cleared up all the other expenses except that $350.00, and that was for his expenses in some phase of it—he had it itemized." We can make of this nothing more than an absolute payment to defendant, intended by the victims to reimburse him for money they supposed he had previously paid out in their behalf. This count is the same as count I in principle and the same conclusion must be reached regarding it.

## Count VIII.

[10] After the victims received the deeds to the Fresno County land, they executed an option on it to a man named Evans, who took the option away with him. Miss Ingersoll had previously talked with defendant by telephone regarding the matter and he had said that Evans would bring out an option prepared by defendant. A little later defendant came to see them and said Evans had substituted another option for the one drawn by defendant and changed the number of acres called for by it to 14½ instead of 4½ that they owned and had then sold it to two men for $18,500, and that these men demanded that the victims either convey 14½ acres or return to the men the $18,500 paid by them for the option, and threatened to sue the victims if this was not done. The victims naturally did not know what to do in this situation. They told defendant they could not pay $18,500, and he then came forward with a solution; he said, according to Miss Ingersoll, that "if we could furnish $3,500 that he could raise $15,000 and he felt somewhat responsible * * * and that he wanted to try to help us all that he could * * * there was nothing to do but try to pay that $18,500." They gave him six bonds as collateral to furnish the $3,500, Miss Proctor furnishing four and Miss Ingersoll two. Miss Ingersoll testified regarding this matter, "we simply delivered our bonds as collateral for something that he would borrow at the bank, but he said he would try to keep those bonds simply as collateral so that they could be returned to us later, instead of sold." Defendant borrowed money on the bonds and then sold them and realized from them, net after furnishing Miss Ingersoll $1,000 to pay off a lien on her bonds, a sum in excess of $2,900 (stated in this count to be $2,921.51). No question is raised about the sufficiency of the evidence to show the fictitious nature of the claim which, according to the defendant, was being asserted against the victims and was to be settled by means of the dealings involved in this count, but we have examined it and find it sufficient on this point. Here again there is evidence that the victims did not intend to pass the complete title to these bonds or their proceeds to the defendant, but intended them to be applied to a special

purpose, and that defendant intended, when he received them, to appropriate them to his own use. A larceny by trick and device sufficiently appears.

Defendant argues, in connection with this count, as well as the others, that Miss Proctor's state of mind cannot be shown by the testimony of Miss Ingersoll and that for this reason the evidence is insufficient. While the intent of the victim is one of the matters to be proved in a case of this kind, and while direct testimony of such victim is receivable in proof of that intent, yet such testimony is not the only possible proof of intent, but in this, as in other cases, intent may be shown circumstantially. Here Miss Ingersoll herself delivered a part of the property obtained by defendant, and she could directly testify to her own intent. She was present when Miss Proctor delivered the property obtained from her, and she could and did testify to the circumstances attending that transaction. Her testimony was sufficient to support the jury's implied finding regarding Miss Proctor's intent. In case of all the other counts which we affirm, Miss Ingersoll herself made all the payments, and her intent, to which she testified, was the intent to be considered, whether she was acting for herself alone or also for Miss Proctor. In the latter case Miss Ingersoll's intent would be imputed to Miss Proctor.

Count IX.

[6c] At the time the victims made the payment discussed under count VIII they gave defendant a promissory note for $15,000 for the money he was supposed to be advancing. On February 14, 1941, Miss Ingersoll paid the defendant $500, "on what he said we owed him." This is another case of an ordinary payment and the offense proved is the obtaining of money by false pretenses. The People urgently contend that because this payment was made for a fictitious consideration, a case of larceny by trick and device is shown. We have already stated our reasons for disagreeing with this contention.

[11] However, the People also contend that in this transaction there was a false token or writing accompanying the false pretense and we think this contention must be

sustained. This payment grew out of the transaction we have described under count VIII. In the course of that transaction, on February 4, 1941, when the $15,000 note was signed, and before the payment involved in this count was made, defendant handed to Miss Ingersoll a writing which purported to be signed by the two men who were making the claim against the victims, and to release the victims from the claim supposed to be so asserted. Since the evidence shows that this whole claim was a fiction, and even that there were no such persons known to defendant as those named by him as claimants, this paper is undoubtedly a false token. (*People* v. *Wynn, supra,* (1941) 44 Cal. App. 2d 723, 728; *People* v. *Payton, supra,* (1939) 36 Cal. App. 2d 41, 53; *People* v. *Pearson, supra,* (1924) 69 Cal. App. 524, 531; *People* v. *Fleshman,* (1915) 26 Cal. App. 788 [148 P. 805].) This release, after it was handed to Miss Ingersoll, was copied by her, and then handed back to defendant by her. She testified to the correctness of her copy and it was admitted in evidence.

[12] The proof of this false token was made only by the testimony of Miss Ingersoll herself, but this fact does not prevent it from satisfying the purpose of section 1110 of the Penal Code. In *People* v. *Martin,* (1894) 102 Cal. 558, 564 [36 P. 952], the Supreme Court raised, without deciding, the question whether corroborating circumstances in regard to a false pretense may be shown by the testimony of the same witness who testified directly to the false pretense. We need not decide it here, for section 1110 requires corroboration only if the false pretense is "unaccompanied by a false token or writing." Under this provision the witness who testifies to the pretense may also testify to the false token or writing accompanying it and needs no corroboration if he does so. Here, secondary evidence of the contents of the release was proper because it was traced back into the possession of the defendant. (*People* v. *Powell,* (1925) 71 Cal. App. 500, 515 [236 P. 311].)

Count X.

[6d] On April 3, 1941, Miss Ingersoll gave defendant $890.55 by endorsing to him a check for that amount pay-

able to her. She had no recollection of her conversation with him at the time. The endorsement was in the ordinary form which transfers title, and we cannot regard the evidence on this count as sufficient to show anything other than such a transfer. No conditions or qualifications to the transfer appear and a case of larceny is not made out.

Count XII.

[13] About July 10, 1941, defendant stated to the victims that he had run across some property that belonged to Evans—the same man who had obtained from them the option above mentioned in the discussion of count VIII—that he could get a lien on and that he had to supply some money to somebody who had investigated the matter and that if he could get hold of that land he could sell it for a large amount of money, and that this land was very valuable. On the same day Miss Proctor sold some shares of *common stock* of Pacific Southern Investors for $438.78 and caused the proceeds to be paid to defendant. She had previously handed the stock to defendant for delivery to the brokers who made the sale and at that time defendant gave her a receipt for this stock. While the date of this transaction differs from that alleged in count XII by four days, the amount is the same. The People assert and the defendant concedes that count XII is aimed at this transaction; hence we so regard it. Miss Ingersoll testified that it was "upon the strength of" the above mentioned statement of defendant and *her* belief in it "that the *bonds* were turned over, of the Pacific Southern Investors." The defendant admits receiving and selling the *stock* described in his receipt, but says the proceeds were applied to the price of land sold by him to the victims. This evidence fails to show that the cause inducing Miss Proctor to turn over to defendant the property, the proceeds of which he ultimately received, was his statements above mentioned. Miss Ingersoll testified only to *bonds* turned over by reason of such representations. The property sold was *stock* of the same corporation. Hence we are left in the dark as to the nature of the transaction by which defendant got the proceeds of the *stock* and cannot say that a crime was committed by defendant. For this

reason we do not consider the People's contention that defendant's receipt was a false token within the meaning of section 1110 of the Penal Code. If the differing descriptions refer to the same property, that can be shown on another trial. It cannot be assumed, without evidence, that such was the fact.

The defendant testified that all his dealings with the victims were mere sales of land or interests therein to them and the payments they made to him were on account of the prices due him on such sales, and denied Miss Ingersoll's testimony of his statements so far as it showed a different state of facts. But this merely raised a conflict in the evidence and, on familiar rules, the trial court's decision in that matter is binding upon us.

The judgments on counts III, IV, V, VIII, and IX, and the order denying a new trial on those counts are affirmed. The judgments on counts I, VII, X and XII, and the order denying a new trial on those counts are reversed and the cause is remanded for a new trial on those counts.

Shinn, Acting P. J., and Wood, (Parker), J., concurred.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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# No. 603

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GEORGE H. BEILFUSS,

*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA.

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APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

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## APPELLANT'S OPENING BRIEF.

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MORRIS LAVINE,
*Counsel for Appellant.*

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# SUPREME COURT OF THE UNITED STATES

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GEORGE H. BEILFUSS,

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## APPELLANT'S OPENING BRIEF.

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*To the Honorable Harlan F. Stone, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:*

This is an appeal from a judgment of conviction in the Superior Court of the State of California, in and for the County of Los Angeles.

Prior to the accusation of the defendant, a citizen of the United States, he was maintaining offices at 503 Commercial Exchange Building at 8th and Olive Street in Los Angeles. On August 20, 1941, Ralph Bagley, a deputy attorney in the district attorney's office, and Mr. Wilson, an investigator for the district attorney's office, and Tommy Thomas, a deputy sheriff, entered his offices without any search warrant or any other process or pretended process, and took from the offices of appellant books, papers and

documents, to-wit, two ledgers containing all of his accounts and books kept by him, a cancelled check in the sum of $360, a deed to appellant, three check books containing all of his check stubs, a group of deposit slips showing his deposits in the bank, and numerous other books, papers and documents, none of which were taken under any lawful authority.

Prior to the taking of the said books, papers and documents, the defendant was arrested and taken to an out-of-town jail in Glendale, California. While he was there incarcerated the search and seizure of his books, papers and documents was made from his private offices and private files without his consent or knowledge.

Thereafter a demand was made upon the district attorney for the return of these books and papers, so unlawfully seized. Appellant's motion was not granted and thereafter a suit for claim and delivery was filed to recover the same, but the criminal trial of the defendant proceeded before any decision on this action, and the books, papers and records so unlawfully seized without any search warrant or other legal process were used in evidence against him and the case resulted in the present conviction.

The question raised by this appeal is whether an unlawful search and seizure and the use of evidence thus obtained in a state court violates the Fourteenth Amendment to the Constitution of the United States, and whether the conviction based upon such evidence so seized is null and void.

The trial court denied the appellant's claim that the use of such evidence, or a judgment based thereon, violates his constitutional rights under the Constitution of the United States and the District Court of Appeal of the State of California, Second Appellate District, Division Three later affirmed the trial court's decision and denied that the defendant's rights under the Constitution of the United States

had been invaded. The Supreme Court of California denied petitioner a hearing.

Article I, section 13 of the Constitution of California provides as follows:

> "In criminal prosecutions, in any Court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the Court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial."

Article I, Section 19, of the California Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

This provision is identical to the Fourth Amendment to the Constitution of the United States.

It is held in *Hammond Packing Co.* v. *State*, 81 Ark. 519, 100 S. W. 407, 126 Am. St. Rep. 1047, that where there is a similar provision in the statutes and Constitution of the United States to the statutes and Constitution of a state, and where the United States Supreme Court decides a case involving such similarity, that decision is controlling upon the state.

It has been repeatedly held that the Fourth Amendment to the United States Constitution forbids searches and seizures of property without a search warrant in a criminal case. (*Weeks* v. *United States*, 232 U. S. 383, 58 L. Ed. 652, L. R. A. 1915b, 834; *Boyd* v. *United States*, 116 U. S. 616, 29 L. Ed. 746; *Gouled* v. *United States*, 255 U. S. 298, 65 L. Ed. 647; *Gobart Importing Co.* v. *United States*, 282 U. S. 344, 75 L. Ed. 374; *Jones* v. *Securities Exch. Comm.*, 298 U. S. 1, 80 L. Ed. 1015.)

The question then arises, whether the use of this evidence which was secured in an exploratory search of the defendant's place of business without any search warrant or other legal process, constitutes a violation of the Fourteenth Amendment, which holds that no person shall be deprived of life, liberty or property without due process of law.

This Court has many times recently had occasion to set forth what it regards as due process of law under the Fourteenth Amendment in the states, in respect to similar provisions prohibited in the national government by the first ten amendments to the Constitution of the United States.

The first ten amendments have been denominated "The Bill of Rights." Today, more than ever, this Bill of Rights has been upheld by this democracy to the world as an example of what liberty-loving people regard as fundamental in their mode of living. From the days of the Magna Charta, when freemen stood before King John and demanded the great charter, the right to be secure in one's person, houses, papers and effects from unreasonable search and seizure has been regarded as one of the most sacred heritages of liberty-loving people.

Article 39 of the Magna Charta sets forth this principle which freemen demanded and received. It was written into the Constitution of the United States in the Fourth Amendment and into the Constitution of California in the same language in Article I, Section 19.

This Court has said that the right of free speech and of a free press, guaranteed by the First Amendment to the Constitution, is also a part of the Fourteenth Amendment. (See, *Bridges* v. *California*, 314 U. S. 252, 86 L. Ed. 192; *Los Angeles Times-Mirror Co.* v. *California*, 314 U. S. 252, 86 L. Ed. 192.)

This Court has also said that freedom of religion, as written into the First Amendment of the United States Constitution, is guaranteed to the states under the Fourteenth Amendment.

This Court has frequently said that the right to have counsel, a right guaranteed by the Sixth Amendment to the United States Constitution, is a right guaranteed under the Fourteenth Amendment. (See *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158.)

But so far this Court has at no time declared its policy regarding the Fourth and Fifth Amendments,—as to whether they are written into the Fourteenth Amendment. This subject was touched upon, but not decided, in *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 53 L. Ed. 530, 543. In that case the Court discusses the relationship of the Fourteenth Amendment to the provisions of the Fourth Amendment as to unreasonable search and seizure, and as to whether it is a deprivation of rights without due process of law. It did not decide the issue. It also points out that the same question was reserved in *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 451, 42 L. Ed. 327.

The Court found it unnecessary in the *Hammond Packing Co.* case to decide whether unreasonable search and seizure violated the Fourteenth Amendment. We have found no decision squarely on this point.

In these days when America is fighting for the principles of freedom, one of which is freedom from fear,—fear of the Gestapo—fear of the policemen's billy—fear of secret and private searches without lawful process,—it is important

that the principles of the Fourth Amendment to our Constitution should be engrafted into the Fourteenth Amendment.

In *Jones* v. *Securities and Exch. Com.*, 298 U. S. 1, 80 L. Ed. 1015, 1025, it was held:

> "The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safe-guards of personal liberty ultimately rest—that this shall be a government of laws—because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in Boyd *v.* United States, 116 U. S. 616, 635, 29 L. Ed. 746, 752, 6 S. Ct. 520, should never be forgotten: 'It may be that it is the obnoxious thing in the mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. * * * It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.'
>
> "Arbitrary power and the rule of the Constitution canont both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day—'there is no place in our constitutional system for the exercise of arbitrary power.' Garfield *v.* United States, 211 U. S. 249, 262, 53 L. ed. 167, 174, 29 S. Ct. 62. To escape assumptions of such power on the part of the three

primary departments of the government, is not enough. Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

The search of appellant's office was a "general, roving, offensive, inquisitorial, compulsory investigation" conducted without any allegations, upon no fixed principles, and governed by no rules of law, and with no restrictions except the will or caprice of the arresting officers. This inquisition is destructive of the rights of the citizens and lends itself to intollerable tyrany. Exercise of such a power falls upon the innocent as well as the guilty; it is one of those intollerable abuses of the Star Chamber which brought that institution to an end at the hands of the long parliament in 1640. (*Jones* v. *Securities and Exch. Com.*, 298 U. S. 1, 80 L. Ed. 1015, 1027.)

As said in *Wallace* v. *Ford*, 21 Fed. Supp. 624:

> "There is something in the American that repels the right of the sovereignty to take up quarters in his home or place of business. It was evidenced by Mr. Jefferson when he penned the Declaration of Independence and complained that the King was quartering soldiers in the homes of free people. One of the amendments to the Constitution of the United States provides that no soldier shall, in time of peace, be quartered in any house without the consent of the owner. Const. Amend. 3. There is something in the soul of the free man that

resents any sort of espionage. One's place of business *is hardly as sacred as one's home, which has been described* as the owner's castle, into which not even the king may enter, unbidden, but it is, nevertheless, safe from unreasonable searches and seizures, and from official surveillance which destroy the very essence of liberty. • • •

"The waiting, spying officer, ready to pounce upon his prey, is really antagonistic to the constitutional provisions which provide that there shall be certain preliminary steps taken before the citizen can be subjected to prosecution. Those precautions grew out of the people's fear of the administrative and executive departments of government. • • •"

This Court has frequently held that seizure of the person and use of evidence obtained through unlawful seizure constitutes a violation of the Fourteenth Amendment to the Constitution of the United States.

In *White* v. *Texas*, 310 U. S. 530, 84 L. Ed. 1342, this Court held that procedural due process is denied to one who, without charges filed against him, is taken out into the woods for interrogation, and who, while in jail was questioned by the sheriff from approximately 11:00 P. M. to 3:00 or 3:30 A. M.

In *Chambers* v. *Florida*, 309 U. S. 227, 84 L. Ed. 716, this Court, condemning similar practices, said:

"Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."

(To the same effect see *Canty* v. *Alabama*, 309 U. S. 629, 84 L. Ed. 988; *Brown* v. *Miss.*, 297 U. S. 278, 80 L. Ed. 682; *Vernon* v. *Alabama*, 313 U. S. 547, 85 L. Ed. 1513; *Lomax* v. *Texas*, 313 U. S. 544, 85 L. Ed. 1511.

Does the concept of due process of law as to unlawful seizure of the person apply equally to unlawful seizure of

evidence? The Fourth Amendment to the Constitution of the United States so holds. It has repeatedly been held as a safeguard against dictatorship.

In *Boyd* v. *United States*, 116 U. S. 616, 29 L. Ed. 746, this Court, speaking through Mr. Justice Bradley, said, with reference to the Fourth Amendment, which declares that the right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, "• • • any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

In *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, 1121, the Court approved the doctrines announced in the *Boyd* case just quoted, and further quoted with approval the following:

> "Unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual deprivation of the right as if it consists more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy, unconstitutional encroachment thereon. Their motto should be obsta principiis."

In *Olmstead* v. *United States*, 277 U. S. 438, 72 L. Ed. 944, 954, Mr. Justice Brandeis, in urging that the government is

estopped by its own conduct from using evidence illegally obtained, said:

> "Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. 'That places the liberty of every man in the hands of every petty officer,' was said by James Otis of much lesser intrusions than these. * * *
>
> "A sufficient answer is found in Boyd *v.* United States, 116 U. S. 616, 627-630, 29 L. ed. 746, 749-751, 6 Sup. Ct. Rep. 524, a case that will be remembered as long as civil liberty lives in the United States. This court there reviewed the history that lay behind the 4th and 5th Amendments. We said, with reference to Lord Camden's judgment in Entick *v.* Carrington, 19 How. St. Tr. 1630: 'The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods, is within the condemnation of

that judgment. In this regard the 4th and 5th Amendments run almost into each other.' • • •

"Time and again, this court, in giving effect to the principle underlying the 4th Amendment, has refused to place an unduly literal construction upon it. This was notably illustrated in the *Boyd* case itself. Taking language in its ordinary meaning, there is no 'search' or 'seizure' when a defendant is required to produce a document in the orderly process of a court's procedure. 'The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures,' would not be violated, under any ordinary construction of language, by compelling obedience to a subpoena. But this court holds the evidence inadmissible simply because the information leading to the issue of the subpoena has been unlawfully secured. Silverthorne Lumber Co. *v.* United States, 250 U. S. 385, 64 L. ed. 319, 24 A. L. R. 1426 40 Sup. C. Rep. 182. Literally, there is no 'search' or 'seizure' when a friendly visitor abstracts papers from an office; yet we held in Gouled *v.* United States, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 261, that evidence so obtained could not be used. No court which looked at the words of the *words of the* amendment rather than at its underlying purpose would hold, as this court did in Ex parte Jackson, 96 U. S. 727, 733, 24 L. ed. 877, 879, that its protection extended to letters in the mails. • • • "The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that

right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the 5th.

"Applying to the 4th and 5th Amendments the established rule of construction, the defendants' objections to the evidence obtained by a wire-tapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.

"Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wire-tapping is a crime. Pierce's Code, 1921, sec. 8976 (18). To prove its case, the government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. Compare Harkin v. Brundage, 276 U. S. 36, ante, 457, 48 Sup. Ct. Rep. 268. * * *

"When these unlawful acts were committed, they were crimes only of the officers individually. The government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the government, having full knowledge, sought through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. Compare The Habana (United States v. The Habana), 189 U. S. 453, 465, 47 L. ed. 901, 903, 23 Sup. Ct. Rep. 593; O'Reilly de Camara

v. Brooks, 209 U. S. 45, 52, 52 L. ed. 676, 678, 28 Sup. Ct. Rep. 439; Dodge v. United States, 272 U. S. 530, 532, 71 L. ed. 392, 393, 47 Sup. Ct. Rep. 191; Gambino v. United States, 275 U. S. 310, ante, 293, 52 A. L. R. 1381, 48 Sup. Ct. Rep. 137. And if this court should permit the government, by means of its officers' crimes to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the government itself would become a lawbreaker.

"Will this court, by sustaining the judgment below, sanction such conduct on the part of the Executives? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.

"The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes spoken of as a rule of substantive law. But it extends to matters of procedure as well. A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

"Decency, security, and liberty alike demand that government officials shall be subjected to the same Rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

In dealing with sections 13 and 19 of the Constitution of California, Article I, and the corrolary sections under the Penal Code of California, to-wit: Sections 1525 and 686, as applied to the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, demands a careful reading of *Go Bart Importing Co.* v. *United States*, 282 U. S. 344, 75 L. Ed. 374, wherein it was held that where the personal papers and documents of the defendant are taken that it violates both the Fourth and Fifth Amendments to the Constitution, and with this in mind and a careful reading of both the major and dissenting opinion in *Twining* v. *New Jersey*, 211 U. S. 78, 53 L. Ed. 97, there is to be added to the cases above referred to, *Bridges* v. *California*, 314 U. S. 252; *McNabb* v. *United States*, 87 L. Ed. advance sheets, p. 579; *Anderson* v. *United States*, 87 L. Ed. advance sheets, p. 589, and *West Virginia Board of Education* v. *Barnette*, 87 L. Ed. advance sheets, p. 1171.

The record in the case at bar will show that the appellant herein, prior to the trial of the case and at the trial, took every procedural step possible under the laws of the State of California to recover his private papers and rec-

ords, but that all of these steps were refused by the California courts.

The question here involved then is whether, under the Fourteenth Amendment the same principles which this Court has ruled on are required by the Federal government under the Fourth Amendment. If they are, then the state should be estopped from using the evidence so unlawfully obtained as being in violation of the Fourteenth Amendment.

To repeat Justice Brandeis words, "Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example."

Today we are called upon to teach the whole world the true meaning of democracy. We cannot do it by permitting lawless searches and seizures and the use of evidence obtained thereby in the state courts, and thus give judicial approval to the violations of the rights of citizens which we proclaim to the world.

In a government of laws, existence of the government "will be imperilled if it fails to observe the law scrupulously"—if the courts approve lawlessness on the part of state officers. The purity of the government requires that it be estopped. (*Silverthorne Lbr. Co.* v. *United States*, 251 U. S. 384, 64 L. Ed. 319.)

In the case of *West Virginia State Bd. of Edu.* v. *Barnette*, 87 L. Ed. 1171, No. 18, Mr. Justice Jackson said:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself, and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free

mind at its source and teach youth to discount important principles of our government as mere platitudes.

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the Fifth Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

"Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, con-

ceived as part of the pattern of liberal government, in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialities as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed * * *

"It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."

In his dissenting opinion Mr. Justice Frankfurter said:

"Practically we are passing upon the political power of each of the forty-eight states. Moreover, since the First Amendment has been read into the Fourteenth, our problem is precisely the same as it would be if we had before us an Act of Congress for the District of Columbia * * *

"When we are dealing with the Constitution of the United States, and more particularly with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'—something without which 'a fair and enlightened system of justice would be impossible.' *Palko* v *Connecticut*, 302 US 319, 325, 82 L ed 288, 292, 58 S Ct. 149; *Hurtado* v. *California*, 110 US 516, 530, 531, 28 L ed 232, 237, 4 S Ct 111, 292."

Freedom from unreasonable search and seizure stands on a parity today with freedom of religion, of speech, of the press and of assembly, as guaranteed by the Bill of Rights. "All are of equal importance to the individual." (*Reeve* v. *Huve*, 33 Fed. Supp. 619, 623; *Hague* v. *Committee*, 101 Fed. 2d 774, 787.)

The interpretation of this highest Court under a similar provision to that contained in the Constitution of California should be accepted as a precedent and be impelling under the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted, Morris Lavine, Attorney for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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# No. 603

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GEORGE H. BEILFUSS,

*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA.

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APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA.

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## APPELLEE'S STATEMENT OPPOSING JURISDICTION.

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## Statutes Cited.


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|---|---|
| Constitution of the United States: | |
| Fourth Amendment | 3 |
| Fifth Amendment | 3,5 |
| Fourteenth Amendment | 3,4,5 |
| Rev. Stat. chap. 135, sec. 19 | 4 |

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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# No. 603

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GEORGE H. BEILFUSS,

*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA.

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## APPELLEE'S STATEMENT OPPOSING JURISDICTION.

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The People of the State of California, appellee, respectfully present the following matters making against the jurisdiction of this honorable court asserted by appellant:

### Statement of Case.

An information was filed in the Superior Court of the State of California, in and for the County of Los Angeles, charging appellant with 12 counts of grand theft. He was convicted on all 12 counts but granted a new trial on Counts II, VI and XI, which were then dismissed. He appealed the convictions to the District Court of Appeal, Second Appellate District, of the State of California, which affirmed the conviction on certain counts and reversed as to others. The Supreme Court of California denied a hearing (59 A. C. A. 97, 138 Pac. (2d) 332).

## Jurisdiction.

The portion of the decision of the District Court of Appeal of the State of California to which appellant makes objections and upon which he predicates his claim of federal jurisdiction is as follows:

> "It appears from a showing made by defendant in the trial court that at the time of his original arrest on the charges involved in this case he was taken from his office, where the arrest was made, and that an investigator from the district attorney's office, who accompanied the arresting officer, but had no search warrant, remained behind after defendant's removal, searched through defendant's papers and removed a part of them. Defendant then began in the Los Angeles Municipal Court an action against the district attorney to recover possession of these papers obtained a speedy trial of that action, and at the commencement of the trial of the case at bar had just received word that the municipal court case had been decided against him, but no judgment had then been entered. He then made a motion for a continuance of the trial of this criminal case to enable him to appeal from the judgment in the municipal court case and have the appeal heard, in the hope of obtaining a reversal of the then as yet unentered judgment. Defendant also presented a petition to the trial court in this case for the return to him of the papers so taken from him, which was denied, the court rejecting his offer to prove the facts above stated. When such papers were offered in evidence he objected to them on the ground that they had been obtained by an unlawful search and seizure, but his objection was overruled and they were received in evidence. His argument here on these matters amounts to a request that we overrule or ignore the decision in *People* v. *Mayen*, 1922, 188 Cal. 237 (205 P. 435, 24 A. L. R. 1383), where it was held that upon an offer of evidence the court will not inquire into the manner in which that evidence was obtained or exclude it because it was obtained by means of an unlawful search and seizure,

and that, while the defendant in such a case has a right to recover possession of papers wrongfully taken, his proceedings to do so are no proper part of the trial of the criminal case against him and the decision thereon cannot be reviewed on appeal from the judgment in the criminal case. This decision was considered and reaffirmed in *People* v. *Gonzales* (1942), 20 Cal. 2d 165, 168 (124 P. 2d 44), and is immune from attack in this court. Neither of these cases dealt with a motion for a continuance, such as we have here, but we think that, on the showing here made, the court did not abuse its discretion in denying the motion."

Appellant assigns said holding as error, in contravention of the due process clause of the Fourteenth Amendment of the Constitution of the United States. In his statement of jurisdiction he hinges the matter on two propositions: (1) whether the principles enunciated by this honorable court under the Fourth and Fifth Amendments are equally applicable to courts of the states under the Fourteenth Amendment, and (2) whether the use in evidence of the books, papers and effects taken from appellant's office without a search warrant so fatally "infects" the fairness of the trial as to constitute a violation of the due process of law guaranteed by the Fourteenth Amendment.

The principles enunciated by this court are that unreasonable search and seizure is prohibited by the Fourth Amendment and that the use in evidence in a criminal prosecution in the federal courts of papers and effects obtained by federal agents in violation of the Fourth Amendment is to compel the defendant to become a witness against himself in violation of the Fifth Amendment. (See *Gouled* v. *United States*, 255 U. S. 298, 41 S. Ct. 261, and authorities there cited.)

This court has heretofore been called upon to apply these principles to prosecutions in the state courts under

the Fourteenth Amendment, not only as to abridgement of privileges and immunities of citizens of the United States, but also as to the due process clause. The court refused to extend the principles above stated to include trials in the state courts. (*Twining* v. *New Jersey*, 211 U. S. 78.) In that case, which arose out of a conviction in a court of the State of New Jersey, this honorable court stated (page 99) "that the exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment against abridgement by the States," and in passing upon the question of whether or not it was a denial of due process of law, said: (page 113)

> "• • • There seems to be no reason whatever however, for straining the meaning of due process of law to include this privilege within it, because, perhaps we may think it of great value. The states had guarded the privilege to the satisfaction of their own people up to the adoption of the 14th Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened, by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands. They may, if they choose, alter it by legislation, as the people of Maine did when the courts of that state made the same ruling. *State* v. *Bartlett*, 55 Me. 200; *State* v. *Lawrence*, 57 Me. 574; *State* v. *Cleaves*, 59 Me. 298, 8 Am. Rep. 422; *State* v. *Banks*, 78 Me. 492, 7 Atl. 269; Rev. Stat. chap. 135, sec. 19.
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> "We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privileges against self-incrimination. We do not intend, however, to lend any countenance to the

truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself and not a denial of it. The reasoning by which this view is supported will be found in the cases cited from New Jersey and Maine, and see *Queen* v. *Rhodes* (1899) 1 Q. B. 77; *Ex parte Kops* (1894) A. C. 650. The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution."

In *Weeks* v. *United States*, 232 U. S. 383, 34 S. Ct. 341, 346, this court said:

"• • • As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court; under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies."

One of the authorities cited by the court in support of the above language is *Twining* v. *New Jersey, supra.*

The provision in the Fifth Amendment, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb" was before the court for consideration as to its inclusion in the Fourteenth Amendment in the case of *Palko* v. *State of Connecticut*, 302 U. S. 218, 58 S. Ct. 148, 150. The argument was there advanced that whatever was forbidden by the Fifth Amendment was forbidden by the Fourteenth also. In answer to

this argument the court stated that there was no such general rule, for it has been held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer, and that the exemption (no person shall be compelled in any criminal case to be a witness against himself) will fail if the State elects to end it, citing among other authorities for the latter statement, *Twining* v. *New Jersey*, *supra*.

As to appellant's second proposition, namely, whether the use in evidence of the books, papers and effects taken from his office without a search warrant so fatally "infects" the fairness of the trial az to constitute a violation of the due process of law guaranteed by the Fourteenth Amendment, is answered, we think, by the language of this court in *Snyder* v. *Commonwealth of Massachusetts*, 291 U. S. 97, 54 S. Ct. 330, where it was claimed that the due process clause of the Fourteenth Amendment was violated by the trial court's refusal to permit the accused to be present at the scene of the crime while it was being viewed by the jury. The court said (p. 332):

> "The commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (Citing authorities, among which is *Twining v. New Jersey*.) Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."

Other pertinent language in that case is the following (p. 338):

"The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

"The Constitution and statutes and judicial decisions of the commonwealth of Massachusetts are the authentic forms through which the sense of justice of the people of that commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (citing authority), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

In *People* v. *Gonzales*, 20 Cal. (2d) 165, 124 Pac. (2d) 44, the Supreme Court of California, in passing upon the matter now under discussion, cited many authorities rendered by this honorable court and other courts of the nation. We shall quote only a small part of the opinion.

"• • • While the United States Supreme Court has held that the due process clause includes the guar-

antee of the Fifth Amendment against compulsory self-incrimination to the extent that the Amendment forbids the use of a confession obtained by coercion or torture (citing authorities), it has done so because a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice. (Citing authorities.) The use of evidence obtained through an illegal search and seizure, however, does not violate due process of law for it does not affect the fairness or impartiality of the trial. (Citing authorities.) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment. It has long been an established rule of evidence that 'the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.' (Citing authority.)"

In *Betts* v. *Brady*, 316 U. S. 455, 62 S. Ct. 1252, this court held that even the denial of counsel to a defendant did not result in all cases in a violation of the Fourteenth Amendment. We quote the concluding paragraph of the opinion, as follows (p. 1262):

> "As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."

From the foregoing authorities it is obvious that the removal of books, papers and effects from the office of appellant, without a search warrant, did not constitute a viola-

tion of the due process clause of the Fourteenth Amendment, and that their use in evidence against appellant did not result in a conviction lacking in fundamental fairness. This is made more apparent when the circumstances under which they were taken are considered. The decision of the District Court of Appeal of the State of California shows that the search and seizure was made contemporaneously with or as an incident of the lawful arrest of appellant.

In *Agnello* v. *United States*, 269 U. S. 20, 46 S. Ct. 4, 5, this court said:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted. (Citing authorities.)"

In *United States* v. *Lee*, 274 U. S. 559, 47 S. Ct. 746, 748, it is said:

> "Moreover search, if any, of the motorboat at sea did not violate the Constitution, for it was made by the boatswain as an incident of a lawful arrest." (Citing *Agnello* v. *United States*, supra.)

**Conclusion.**

It is to be noted that no statute of the State of California is drawn in question by the appeal herein, but only a final decision of a court which it is asserted deprives appellant of a right, privilege and immunity specially set up and claimed by him under the Constitution of the United States. Therefore the appeal was improperly taken. The papers on which the appeal was allowed may, however, be treated as a petition for writ of certiorari. (*Memphis*

*Natural Gas Company* v. *Beeler*, 315 U. S. 649, 62 S. Ct. 857, 860.)

Appellee moves that the appeal be dismissed, and that petition for writ of certiorari, if the papers are so treated, be denied for want of a substantial federal question.

Respectfully submitted,

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FRANK RICHARDS,
*Deputy Attorney General,*
*Attorneys for Appellee.*

No. 603. BEILFUSS *v.* CALIFORNIA. Appeal from the District Court of Appeal, 2d Appellate District, of California. February 7, 1944. *Per Curiam:* The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code as amended, 28 U. S. C., § 344 (c), certiorari is denied. *Mr. Morris Lavine* for appellant. *Messrs. Robert W. Kenny,* Attorney General of California, and *Frank Richards,* Deputy Attorney General, for appellee. Reported below: 59 Cal. App. 2d 83, 138 P. 2d 332.